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Supreme Court of the United States

October Term, 1961

No. 468

In the Matter of the Application
of
STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER E. GIBB, JANE EHLES, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIRGILE S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETTELENZ, DANIEL J. REILLY, THOMAS DELANEY and EDWARD J. MACFARLANE,

Intervenors-Respondents.

BRIEF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICI CURIAE*

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Statutes and other Authorities:

Brooklyn Tablet, August 1, 1959 23
Babylonian Talmud, B'rachot 20

Caswell, Hollis L., and Campbell, Doak S., *Curriculum Development*. American Book Co., New York, 1935 12
Civil Practice Act (New York), Article 78 4
Secs. 588, 590 6
Commentary on the Sh'iltot, Epstein, J. N., publisher 20
Costanzo, Joseph F., "Religious Heritage of American Democracy", *Thought*, Winter, 1955-56 23
Counts, George S., III *Encyclopedia of the Social Sciences* (1937 ed.) "Education" 12

Geiger, Abraham, *Israelitisches Gebetbuch* (Jewish Prayerbook) 20
Goslin, William E., *Freedom and Public Education*, "Responsibilities of American Education" (1953) 12

Jerusalem Talmud, B'rachot 20

Maimonides, *Mishna Torah, Sefer Ha'Ahavah* 20

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National Education Association of the United States and American Association of School Administrators, *Moral and Spiritual Values in the Public Schools*, Washington, D. C., 1951 12
New York Herald-Tribune, May 16, 1960 23
New York Journal American, February 25, 1959 23
New York Times,
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March 13, 1961 23
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Philipson, David, *Centenary Papers* (1919) 20

Quillen, I. James, *Public Education in America*, "The Curriculum and the Attacks on the Public Schools" (1958) 12

Revue des Etudes Juives (1922), Vol. 55 20
Religious News Service, September 28, 1959 23

Stratemeyer, Florence, and others, *Developing a Curriculum for Modern Living* (1957) 12

United States Constitution,
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Webster's Third New International Dictionary (1961 ed.) 21

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BRIEF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICI CURIAE*

Interest of the *Amici*

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

> The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto * * *

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

It has been among the fundamental tenets of the organizations which appear as *amici curiae* herein that the welfare and the security of members of minority religious groups in the United States depend upon the preservation of constitutional guarantees for all; that an invasion of the rights of any religious group is ultimately a threat to the religious freedom of all groups and to the individual members thereof.

This case places in issue the constitutionality under the First Amendment of prayer as part of the opening exercise in the public schools of the State of New York. We deem it appropriate, at this point, to state that the constituency of both of the *amici* includes vast numbers of people who not only believe in the existence of God, but devoutly worship Him. The constituency of the *amici* be-

lieve however that prayer, in our democratic society, is a matter for the home, synagogue and church, and not for the public schools. They wholeheartedly support the First Amendment to the United States Constitution and its underlying public policy which requires separation of church and state in the interest of both. Hence, they are concerned with the decision of the New York Court of Appeals upholding the constitutionality of the recitation of the Regents' prayer in the public schools of New Hyde Park.

The New York State Board of Regents by sponsoring prayer in the public schools and recommending its specific form, sought to satisfy the demands of certain segments in our society which insist on the introduction of religious practices in the public schools, concededly out of good motives. The Board of Regents hoped that a prayer could be devised which would be unobjectionable to all three major religious faiths and still meaningful in terms of teaching a reverence for the Creator. The danger inherent in this process is that a state agency undertook to evaluate the spiritual needs of the student population of the public schools and to establish the means to satisfy such needs. This tends to belittle creedal differences and to establish a form of "public school religion" or "least common denominator religion".

Freedom of religious belief, observance and worship can remain inviolate only so long as there is no intrusion of religious authority in secular affairs or secular authority in religious affairs. Each breach in this separation of role and function tends to beget additional breaches and, hence, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith are opposed to any and all forms

of establishment of religion by which a state agency undertakes to provide for the religious needs of children.

For these reasons, the two organizations join in filing this brief *amici curiae* with the permission of this Court.

Statement of the Case

On November 30, 1951, the New York State Board of Regents, the agency charged by the Education Law with supervision of the school system of the State, adopted a Statement on moral and spiritual training in the schools. That Statement, a copy of which is annexed as Appendix "A" for the convenience of the Court, recommended that the Pledge of Allegiance at the commencement of each school day "might well be joined with this act of reverence to God: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.' "

At a meeting of the Board of Education, Union Free School District Number Nine, New Hyde Park, New York, held on July 8, 1958, a motion was duly made and carried that the Board of Education direct the district principal to institute the Regents' prayer as a daily procedure to follow the Pledge of Allegiance.

A proceeding under Article 78 of the Civil Practice Act was instituted by five taxpayers whose children attended the public schools in District Number Nine, for an order directing the members of the Board of Education to discontinue the recitation of the Regents' prayer in the local public schools. Sixteen taxpayer parents who opposed the petition were granted permission to intervene to argue the issues arising under the United States and New York Constitutions.

Mr. Justice Bernard S. Meyer, at Supreme Court, Special Term, Nassau County, decided on August 24, 1959, that the Establishment Clause of the First Amendment does not bar the Regents' prayer from the public schools, but that the Free Exercise Clauses of the Federal and State Constitutions require that children whose parents object to their participation be excused. To achieve this objective, Mr. Justice Meyer required that notice to the parents specify the wording of the prayer and the procedure to be followed when the prayer is recited, to enable the parents to make a conscious choice whether or not to permit their children to participate in the religious exercise. Regulations to be adopted by the School Board were also to make it clear that neither teachers nor other school authorities might comment on participation or non-participation of the students, nor suggest the assumption of any posture in connection with the prayer. The Board was required to provide facilities for those children whose parents requested that they be excused from the room during the recitation of the Regents' prayer. Mr. Justice Meyer, in the exercise of his equitable jurisdiction, denied the petition but remanded the matter to the School Board for further proceedings not inconsistent with his opinion. *Engel* v. *Vitale*, 18 Misc. 2d 659.

Petitioners appealed to the Appellate Division, Second Department, which, on October 17, 1960, affirmed the order of Mr. Justice Meyer in a *per curiam* opinion. In a separate opinion Mr. Justice Beldock concurred in part and dissented in part. *Engel* v. *Vitale*, 11 App. Div. 2d 340.

The Supreme Court, Nassau County, after receiving an affidavit from the President of the Board of Education of Union Free School District Number Nine, advising the

Court that the Board's resolution and regulations had been amended in accordance with the Court's opinion, on March 17, 1961 entered a final order dismissing the proceeding on the merits. An appeal therefrom was taken to the New York Court of Appeals pursuant to the provision of Sections 588 and 590 of the Civil Practice Act.

By a 5 to 2 division the Court of Appeals affirmed the final order of the Supreme Court, Nassau County. *Engel* v. *Vitale*, 10 N. Y. 2d 174. This Court granted the petition for a Writ of *Certiorari* on December 4, 1961.

The Question Presented

This case presents this Court with the question whether the recital of a prayer composed by state authority and required by a local school board as part of the opening exercise in the public schools at the beginning of each school day violates the Establishment Clause of the First Amendment of the United States Constitution.

Summary of Argument

The action of a local Board of Education, directing the inclusion of the Regents' prayer in the opening exercise in the public schools, constitutes an establishment of religion in violation of the First Amendment of the United States Constitution. This Amendment, as interpreted by the United States Supreme Court, prohibits state as well as Federal agencies from aiding one or all religions, from using the public schools for religious exercises, or from blending secular and religious instruction.

The doctrine that public schools may adjust their program to accommodate the needs of sectarian groups to schedule their programs of religious education off school premises does not apply to this case. Provision for the excuse of pupils whose parents object to their participation in the school-sponsored religious exercise does not save this practice from its constitutional invalidity.

The contention that prayer in public schools could be upheld because it has been traditional in some school systems is not dealt with in this brief. It is our view that such a contention can no more justify practices which are in violation of the clear meaning of the First Amendment than the tradition of racial segregation in the South can safeguard those practices from attack under the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

The resolution of a public school board directing the recitation of a prayer as a daily procedure in the public schools violates the constitutional prohibition against an establishment of religion.

A. The Establishment of Religion Clause of the First Amendment

The First Amendment to the United States Constitution provides, in part, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *

This provision against action by Congress has been held equally applicable to action by the states or any of their

political subdivisions. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

The Establishment of Religion Clause has been defined by this Court in *Everson* v. *Board of Education*, 330 U. S. 1 (1947), as follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." *Id.* at 15-16.

There was no disagreement between the majority and minority opinions in *Everson* concerning that definition. This Court noted such agreement in *McCollum* v. *Board of Education*, 333 U. S. 203, 211 (1948) and in *Torcaso* v. *Watkins*, 367 U. S. 488, 493 (1961). Whether or not this definition of the Establishment Clause was *obiter dictum* in *Everson*, it indisputably became the *ratio decidendi* in *McCollum*, as acknowledged by this Court's opinion in *Torcaso*. This

definition of establishment was reaffirmed in the opinion of the Chief Justice in *McGowan* v. *Maryland*, 366 U. S. 420, 443 (1961) and in *Torcaso, supra*, at 492-3.

By the frequent reassertion of this broad definition of the Establishment Clause, this Court has repeatedly rejected all efforts, such as by the New York Court of Appeals in its decision below, to narrow or restrict the meaning of that clause to "official adoption of, or favor to, one or more sects". *Engel* v. *Vitale*, 10 N. Y. 2d 174, 180. A similar effort by a state court to narrow and restrict the meaning of the Establishment Clause was rejected by this Court in *Torcaso*.

B. The *McCollum* decision controls this case.

McCollum made the definition of the Establishment Clause as spelled out in *Everson* the basis for a determination that a released time program in the public schools of Champaign, Illinois, violated the First Amendment. Under that program, children attending public schools, whose parents so requested, were released for a thirty or forty-five minute period each week, during the regular school time, to receive religious instruction by sectarian teachers. Such classes were conducted in the regular classrooms of the school building. Students whose parents did not wish them to participate in the religious instruction were not required or permitted to remain in the classroom where such instruction took place. Instead, they were assigned another place in the public school building for the pursuit of their secular studies. *McCollum* v. *Board of Education, supra*, at 207-209.

The program in the public schools of Champaign, involved in *McCollum*, may be characterized by these elements:

1. It was a religious program;

2. The public school classrooms were used;

3. The regular public school time was used; and

4. Participation was limited to children whose parents consented.

This Court, in an eight-to-one decision, held this Champaign program unconstitutional under the Establishment Clause of the First Amendment. The Court concluded that "the foregoing facts * * * show the use of tax-supported property for religious instruction * * *" *Id.* at 209. Such use of "tax-supported property" was a violation of the prohibition against laws "which aid one religion, aid all religions, or prefer one religion over another."

The public school program in issue in this case was described by the trial court as "said aloud at the commencement of the school day, by each class, in the classroom in the presence of a teacher." 18 Misc. 2d at 670. The prayer followed the salute to the flag. Children who did not wish to participate, were not required to do so.

Thus, it is clear that the significant features of the Champaign program struck down by this Court in *McCollum* and listed above, are also present in this case:

1. It is a religious program;

2. The public school classrooms are used;

3. The regular public school time is used; and

4. Participation is limited to children whose parents consent.

Both the trial court and the court below based their decision on the premise that the recital of the Regents' prayer was not religious instruction or education. Both conceded that religious instruction or education in the public schools would be clearly unlawful.

We submit that the clear purpose as well as the effect of requiring recital of a prayer as part of the public school's opening exercises, is instruction of the children that Almighty God is their Creator, that they must acknowledge their dependence upon Him and beg His blessings upon them, their parents, their teachers and the United States. Just as the Pledge of Allegiance and the singing of the national anthem—also part of the opening exercises—are intended to inculcate in the children a deep sense of loyalty and patriotism and to instruct them in their duties and obligations to our country, so, too, the recital of the prayer is intended to instruct the children in that love for God, for parents and for home which is the mark of "true character training". Regents' Statement, Appendix "A".

There can be no doubt that the purpose of commencing the school day with the Regents' prayer is to teach the children committed to the care of the public school that "respect for lawful authority and obedience", as taught by the school, is predicated upon "belief in and dependence upon Almighty God." *Ibid.* Such is its express purpose, and there would be no point to the exercise were it otherwise.

It is now generally accepted that the pupil is being and should be subjected to a learning experience during the entire period that he is entrusted to the public school—from the assembly in the school yard to final dismissal. This learning experience is not limited to the substantive content of classroom instruction in specific subjects, but embraces the total program of the school day, in all its varied aspects.

including opening exercises, teacher attitudes, behavior in the classrooms and assemblies and at lunch, interrelationships with teachers and classmates, special drills such as air raid and fire drills, and even appropriate attire. Educational Policies Commission, National Education Association of the United States and American Association of School Administrators, *Moral and Spiritual Values in Public Schools*, Washington, D. C., 1951, pp. 58-59.[1] How, then, can the recital of the Regents' prayer in the classroom be isolated from the total learning experience and regarded as something non-instructional in character? If, as the trial court believed, prayer in our public schools is "traditional", it is no less instructional albeit "traditional".

Apart from the instructional nature of the Regents' prayer, clearly it is a religious rite. All prayer is communication with and appeal to the Creator; it is the most fundamental expression of religious faith.[2]

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1. See also, Caswell, Hollis L., & Campbell, Doak S., *Curriculum Development*, American Book Co., New York, 1935, p. 69; Counts, George S., "Education", III *Encyclopedia of the Social Sciences* (reissued ed.) 1937, p. 413; Goslin, William E., "Responsibilities of American Education", *Freedom and Public Education*, Praeger, New York, 1953, p. 47; Quillen, I. James, "The Curriculum and the Attacks on the Public Schools", *Public Education in America*, Harper & Bros., New York, 1958, p. 119; Stratemeyer, Florence, & others, *Developing a Curriculum for Modern Living*, Columbia University, 2nd ed., 1957, pp. 661-2.

2. The Talmud, commenting on *Deut.* 11:13, describes prayer "as the 'divine service of the heart'. It is often regarded as superior to all other sacrifices. God loves prayer, especially that of the pious man; but it must be performed in the right spirit, not as a fixed task that has to be done, but as a fervent pouring out of the soul of the pious man which comes from the heart which is truly moved. The worshipper must feel that he is standing in holy awe before the majesty of God * * * One should enter upon prayer in the spirit of deepest humility and holy reverence, and one should pray only when one has a longing to do so in one's own heart and is attuned to it by reason of a devotional mood." 8 *Universal Jewish Encyclopedia* "Prayer" 618.

Whether the Regents' prayer is deemed instructional or merely devotional or, as we believe, both, it is clearly an act of religion, as conceded by the Chief Judge in the court below—"The 'Regents prayer' is an acknowledgment of our dependence upon Almighty God and a petition for the bestowal of His blessings." 10 N. Y. 2d at 180. If carried on in the public school building during regular school hours such prayer thus constitutes aid to one or all religions and violates the Establishment Clause as interpreted by this Court in *McCollum*. In fact, the involvement of the public school authorities in religion is even more apparent and pervasive in the case of the Regents' prayer than in the Champaign released time program. The practice here in issue is an official school activity over which the classroom teacher presides. The prayer in question was composed, endorsed and promoted by the Board of Regents, a state authority. This prayer and the Pledge of Allegiance are parts of the opening exercise, which blends religious and secular concerns and commingles God and Caesar.[3] In contrast, the practice struck down in *McCollum* involved religious instruction by non-public school teachers in separate rooms with the public school teacher not in control of the class. *McCollum* v. *Board of Education*, *supra*, at 208.

Bible reading, in conjunction with the recitation of the Lord's Prayer and the Pledge of Allegiance, as an opening public school exercise, was recently held to be "a religious ceremony" and hence unconstitutional under the Establishment Clause of the First Amendment, notwithstanding statutory provision for the excuse of children whose parents request it. *Schempp* v. *School District of Abington Township*, U. S. D. C. E. Pa., February 5, 1962; 30 U. S. L. W. 2380.

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3. From Mr. Justice Jackson's dissenting opinion in *Zorach* v. *Clauson*, 343 U. S. 306, 325 (1952).

When the same case was previously before the three-judge statutory court, it said that:

> The addition of the Flag Salute to the ceremony cannot be deemed to detract from the devotional quality of the morning exercises. Our backgrounds are colored by our own experiences and many of us have participated in such exercises as those required in the Abington Township schools in our childhood. We deemed them then and we deem them now to be devotional in nature, intended to inculcate religious principles and religious beliefs. *Schempp* v. *School District of Abington Township*, 177 F. Supp. 398, 406 (1959).

It is true that the prayer involved in *Schempp* was the Lord's Prayer and not the Regents' prayer. But just as the Lord's Prayer is acceptable to some and objectionable to others, so, too, the Regents' prayer is acceptable to some and objectionable to others.[4]

In the whole history of mankind, no one has thus far been able to formulate any single means of communicating with God in a manner acceptable to all men, which would be required to render it truly "non-sectarian". It was this impossibility of securing agreement on matters of religious faith that led the framers of the First Amendment to insist upon the separation of the institutions of the state from those of the various religions.

C. The *Zorach* decision is not controlling.

This Court's interpretation of the meaning of "establishment of religion", as set forth in *McCollum*, *supra*, was in no way weakened by its subsequent decision in *Zorach* v. *Clauson*, 343 U. S. 306 (1952). In upholding the New York

4. For discussion of specific religious objection to the Regents' prayer, see pp. 20-21, *infra*.

released time program in that case, this Court distinguished the facts from those in the *McCollum* case, since the New York program did not involve use of public school buildings for religious instruction. The Court expressly endorsed the principle enunciated in *Everson* and *McCollum*—"We follow the *McCollum* case." 343 U. S. at 315. This was reaffirmed in *Torcaso* v. *Watkins*, *supra*, at 494.

That the New York released time program was upheld in *Zorach* while the Champaign program invalidated in *McCollum* was explained by this Court as a result of the factual differences between the two released time programs, *Zorach* v. *Clauson*, *supra*, at 315; *Zorach* was not a "retreat" from *McCollum*, as interpreted by the trial court, 18 Misc. 2d at 688.

In his opinion in *Zorach*, Mr. Justice Douglas reiterated "that the First Amendment reflects the philosophy that Church and State should be separated." Insofar as both the free exercise of religion and the establishment of religion are concerned, "the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute." *Id.* at 312. This Court held the New York released time program not violative of the First Amendment because such program did not involve any use of the public schools to promote religious worship or instruction. The only role played by the school was to "close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction." *Id.* at 314. Or, as the Court expressed it elsewhere, all that was done by the public schools in New York was to make "adjustments of their schedules to accommodate the religious needs of the people." *Id.* at 315.

This reasoning, supporting the *Zorach* holding, is inapplicable to the case at bar. First, the Board of Regents

presumed to act as an ecclesiastical authority in devising and composing a prayer. Second, this prayer is recited within the public school buildings. Third, far from merely "closing its doors" to accommodate those wishing to participate in outside religious activities, the school authorities themselves sponsor the Regents' prayer, which becomes an integral part of the daily public school program under the guidance and control of the teacher. Fourth, the opening exercise blends secular (Pledge of Allegiance) and religious (Regents' prayer) programs, a combination condemned in *Zorach*. *Id.* at 314. Finally, the Regents' prayer constitutes "religious instruction" undertaken by the government, also condemned in *Zorach*. *Ibid.*

Mr. Justice Meyer in his opinion in the trial court used the concept of "accommodation" (18 Misc. 2d at 693) to justify upholding the Regents' prayer. In doing so, he expanded the concept far beyond the meaning given it by this Court. "Accommodation" cannot be used as an open-sesame to introduce all kinds of religious practices into the public schools; its meaning must be understood in light of the factual situation discussed in *Zorach*, or the constitutional prohibition on establishment will lose all its substance.

D. The program is unconstitutional even though objecting children may be excused.

This Court has recognized the distinction between the Establishment Clause and the Free Exercise Clause of the First Amendment. *Zorach* v. *Clauson*, *supra*, at 310-312; *McGowan* v. *Maryland*, *supra*, at 430. This difference is particularly striking when we consider the effect on the constitutionality of a provision for the non-participation of

objecting pupils. It may be argued that permission for non-participation makes a religious program innocuous from the point of view of the free exercise of religion. However, the presence or absence of compulsory attendance is irrelevant in any discussion of the constitutionality of a program under the Establishment Clause. This clause of the First Amendment prohibits any agency of the state from undertaking or sponsoring religious programs, and it is of no moment that all or some of the citizens participate in such programs. Clearly, the holding of a Mass in a public school during the regular day would violate the Establishment Clause even though all non-Catholic pupils were permitted or required to absent themselves.

This point is illustrated in the *McCollum* case. There, the Champaign released time program was invalidated under the Establishment Clause even though there was no question of compelling any child to participate in the religious indoctrination. On the contrary, only children whose parents signed consent cards were released from their secular studies to receive religious instruction. *McCollum* v. *Board of Education*, *supra*, at 207.

Mr. Justice Meyer, in his opinion in the trial court, ignored this vital distinction between the Establishment and the Free Exercise Clauses. He objected to the mandatory terms of the Board's resolution setting up the Regents' prayer program, and required the Board to provide expressly for the choice of non-participation by those children whose parents disapproved on religious grounds. While this requirement might save the program from a constitutional attack under the Free Exercise Clause, it cannot save it under the Establishment Clause. Once it is conceded that the program deliberately brings a religious practice into the

public schools it is a violation of the Establishment Clause and remains so notwithstanding provision for non-participation.

One of the vices of the Regents' program for the inclusion of a prayer in the opening school exercises, notwithstanding provision for non-participation, is the fact that the program places the "stamp of approval" of the state on the religious ceremony. *Tudor* v. *Board of Education of Rutherford*, 14 N. J. 31, 51 (1953). This has the effect of coercing public school children to participate in a religious rite, just as the released time program in Champaign "had the effect of coercing the children to attend religious classes". *McGowan* v. *Maryland*, *supra*, at 452. See also, Mr. Justice Frankfurter's concurring opinion in *McCollum*, *supra*, at 230.

The non-participating children are inevitably set apart as non-conformists and subjected to social and psychological pressure to modify their beliefs and conduct. The choices open to the non-participating child are all bad: he may ask to be excused and hence label himself as a non-conformist to his classmates; he may yield to the pressure and participate in the exercise despite the conflict with his beliefs.

The dilemma in which the child is thus placed is not of his own creation; it is created for him by the resolution of the Board to conduct religious prayer as part of the public school program. To consider the "obvious pressure" thus exerted upon public school children as beyond the Court's cognizance, is "to draw a thread from a fabric". *Id.* at 227, 230. It fails to accept the fact that the public school authorities, by deliberately introducing a religious exercise, are responsible for imposing the dilemma upon children who have been committed to their care solely for secular education.

Several state courts, when called upon to consider various religious practices in the public schools, have held that provision for non-participation did not save a school-sponsored religious program from invalidity under state constitutional provisions which had the same objectives as the First Amendment.

> The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the Constitution. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351 (1910).
>
> It is said, if reading the Protestant version of the Bible in school is offensive to the parents of some of the scholars, and antagonistic to their own religious views, *their children can retire.* They ought not to be compelled to go out of the school for such a reason, for one moment. The suggestion itself concedes the whole argument. *State ex rel. Weiss* v. *District Board*, 76 Wisc. 177, 219, 220 (1890). (Emphasis in original.)
>
> And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. *Herold* v. *Parish Board of School Directors*, 136 La. 1034, 1050 (1915).

It is submitted that the case at bar cannot be distinguished from the cases cited above, on the theory that they involved sectarian practices, whereas the Regents' prayer is supposedly non-sectarian. Quite apart from the position of agnostics and atheists, to whom all appeals to Divine Providence are obviously sectarian,[5] prayer, as a central institution of each of the major Western religions, has a separate and distinct meaning for the adherents of each sect and denomination of such religions. This is true with respect to the forms and content of prayer.[6] It is also true with respect to the demeanor required of the supplicant

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5. That non-believers are entitled to the protection of the First Amendment is beyond dispute. *Everson* v. *Board of Education*, *supra* at 15, 18; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943); *McCollum* v. *Board of Education*, *supra* at 210; *Torcaso* v. *Watkins*, *supra*.

6. "He who changes the form of the prayers as decreed by the Sages has not properly fulfilled his religious obligations", *Babylonian Talmud, B'rachot*, 40b; "Change not the form of the prayer", *Jerusalem Talmud, B'rachot*, Chapter 5, Halacha 2, p. 9b (Krotoshin ed.); "Rav Nachshon [*circa* 8th cent.] wrote: one does not make any change in the prayers ordained by the Sages", *Commentary on the Sh'iltot* (Berlin mss.) published by Epstein, J. N., in *Revue des Etudes Juives* (1922) Vol. 55, p. 184; "The form of all blessings was decreed by Ezra the Scribe and his court, and ought not either to be changed nor added to nor diminished from, and whosoever changes the form of blessings decreed by the Sages is most certainly in error", Maimonides, *Mishna Torah, Sefer Ha'Ahavah, Hilchot B'rachot*, Chapter 1, par. 5; "As a general rule, one who changes the form of prayers as decreed by the Sages, most certainly is in error, and must repeat the prayers according to the proper form", Maimonides, *Mishna Torah, Sefer Ha'Ahavah, Hilchot K'ri'at Sh'ma*, Chapter 1, par. 7.

"The significance of the prayers consists not alone in their content but also in their traditional forms, in the verbiage in which they have been bequeathed to us, hence, also in the Hebrew language. This must remain, therefore, with few exceptions, the language of prayer", Geiger, Abraham, *Israelitisches Gebetbuch*, (Jewish Prayer-book) quoted by Philipson, David, *Centenary Papers*, Cincinnati (1919) p. 124.

while he is praying. To a deeply religious person, these differences may go to the root and essence of his religion. It may be that the Regents' prayer, in its form and content, is not objectionable to a number of sects and denominations, perhaps even to a majority; but it is a form of prayer not known or accepted in the homes, synagogues and churches of many children attending the public schools of New York. A confusion is thus created in the minds of many children who are exposed to one form of religious experience at home, synagogue or church and subjected to a different form in public school.[7]

This is particularly true of the adherents of orthodoxy[8] in all religions which is characterized by strict maintenance of old established forms of worship. In the view of adherents of orthodox religions, any prayer which deviates from accepted forms is objectionable. There is no prayer which has been universally accepted by all Western religions as to form and content.

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7. The problems which the public school authorities have to tackle in a futile effort to regulate the saying of the Regents' prayer while at the same time seeking to protect the constitutional rights of all children, is illustrated in this case by the disagreement between Mr. Justice Meyer in the trial court and Mr. Justice Beldock in the Appellate Division of the New York Supreme Court, 11 A. D. 2d 340, 348-9, in their respective opinions as to the conduct that should be required of the non-participants. It was to eliminate conflicts of this type that the First Amendment was adopted. II Madison, 186-191, para. 11; *McCollum* v. *Board of Education*, *supra* at 212, 216-17.

8. Orthodoxy is defined as "conformity to an official formulation of truth especially in religious belief or practice." *Webster's Third New International Dictionary*, G. & C. Merriam Co., Springfield, Mass., 1961, p. 1594.

E. The recent decisions of this Court in the Sunday Closing Law cases strengthen the conclusion that the Regents' prayer is unconstitutional.

On May 29, 1961 this Court ruled on the constitutionality of a series of state statutes prohibiting certain business and and labor activities on Sunday. These statutes were attacked as unconstitutional under the First and Fourteenth Amendments. One of the grounds urged upon this Court was that these acts were religious legislation and hence constituted an establishment of religion.

The Chief Justice, speaking for the Court in *McGowan* v. *Maryland*, *supra*, conceded that these Sunday closing laws were religious in their origin. He held, however, that they had lost their religious character, had become secular legislation, and therefore "presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States." *Id.* at 444.[9] He added that Sunday legislation would violate the Establishment Clause if it could be "demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." *Id.* at 453.

While in the case at bar there is no legislative act, only administrative action by agencies of the state, this distinction is not material. *McCollum* v. *Board of Education*, *supra*. It is respectfully submitted that the Regents' prayer, which is at issue in this case, has a religious purpose, as documented by the Regents Statement (Appendix "A") and, as has already been shown, is religious in its effect.

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9. See also *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617, 630, and *Braunfeld* v. *Brown*, 366 U. S. 599, 605, 607.

To meet the test spelled out by the Chief Justice in the Court's opinion in *McGowan*, it would be necessary to find that the Regents' prayer is a "secular prayer," a contradiction in terms.

F. Various religious practices not involving public schools are not legal precedents for this case.

In public debates on separation of church and state in the United States, reference is frequently made to various practices carried on under the authority of government, such as chaplains in the Congress, Presidential proclamations of a day of Thanksgiving, and invocation of God at court openings. These practices are cited to support the proposition that religious practices may be included in the public schools.[10]

In fact, the Court of Appeals' opinion below mentions some of these traditional practices to buttress its conclusion that the First Amendment does not exclude prayer from the schools. In this connection, the Court of Appeals cited the dictum of Mr. Justice Douglas in *Zorach* v. *Clauson*, *supra*, that "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313.

The opinion below said this statement "paraphrased the Supreme Court's similar assertion in 1892 in the *Holy Trinity Church* case." This was obviously a reference to

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10. Costanzo, Joseph F., "Religious Heritage of American Democracy", *Thought*, Winter, 1955-56, pp. 485-506; *New York Journal American*, February 25, 1959, Editorial; *Brooklyn Tablet*, August 1, 1959; *Religious News Service*, September 28, 1958; *New York Herald-Tribune*, May 16, 1960, "Letters to the Editor"; *The New York Times*, March 9, 1961, p. 17, March 12, 1961, p. E9, March 13, 1961, p. 25, March 15, 1961 (Catholic Statement on School Loan Bill) p. 26.

the phrase "* * * this is a Christian nation." *Church of the Holy Trinity of the United States* v. *United States*, 143 U. S. 457, 472 (1892). We do not believe that the statement of Mr. Justice Brewer in the *Holy Trinity Church* case, implying as it does a second-class status in the United States for non-Christian religions, was what Mr. Justice Douglas meant in his statement quoted from *Zorach*. As a matter of fact, Mr. Justice Douglas himself in his recent dissenting opinion in *McGowan* v. *Maryland*, *supra*, at 563, expounded on his statement in *Zorach*.

Mr. Justice Douglas noted that the individual possessed rights "conferred by the Creator, which government must respect" and he cited the Puritan influence which helped shape our society and which "put individual conscience and individual judgment in the first place." *McGowan* v. *Maryland*, *supra*, at 562-563. Having said this to explain his statement that "We are a religious people whose institutions presuppose a Supreme Being," Mr. Justice Douglas emphasized his view of the First Amendment as requiring "that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the government." *Id.* at 563.

The *amici* herein agree that the state and religion in the United States are not and should not be "hostile, suspicious [or] even unfriendly." *Zorach* v. *Clauson*, *supra*, at 312. This mutual respect between the institutions of church and state accounts for many of the traditional practices cited by this Court in *Zorach* (at 313) and by the Court of Appeals below. But the Regents' prayer, which is here in issue, is something different. It is the introduction into the school program of a religious act—prayer to God—which has been designed, authored and endorsed by a state authority.

It should be noted that none of the traditional practices, cited by Mr. Justice Douglas in *Zorach*, relates to the sensitive area of public school education. Extreme care must be exercised not to extend beyond their original scope practices which still await judicial endorsement. We believe, for example, that the employment of chaplains by the Congress is no authority for the employment of chaplains by the public schools.

Some of the traditional religious practices cited in public discussions of church-state issues spring from colonial days before disestablishment and the adoption of the First Amendment. One of the reasons that they continue to this day is that it is most difficult to secure authoritative adjudication of their constitutional validity. See *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

Conclusion

The Regents' prayer, required as part of the opening exercises in the public schools of New Hyde Park, New York, is an establishment of religion in violation of the First Amendment made applicable to the states by the Fourteenth Amendment. The decision of the Court of Appeals should therefore be reversed.

Respectfully submitted,

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February 27, 1962

Appendix "A"

NEW YORK STATE BOARD OF REGENTS STATEMENT OF NOVEMBER 30, 1951

Belief in and dependence upon Almighty God was the very cornerstone upon which our founding fathers builded.

Our state constitution opens with these solemn words: "We the people of the State of New York, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this constitution."

We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days.

In our opinion, the securing of the peace and safety of our country and our state against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Almighty God is their creator and that by Him they have been endowed with their inalienable rights of life, liberty and the pursuit of happiness.

We believe that at the commencement of each school day the act of allegiance to the flag might well be joined with this act of reverence to God: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country."

We believe that the school day thus started might well include specific programs stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors placed in Almighty God, their gratitude to Him from whom they freely and frequently acknowledged came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgement of the fatherhood of their creator, Almighty God, whom they loved and reverenced in diverse ways.

We believe that thus constantly confronted with the basic truth of their existence and inspired by the example of their ancestors, our children will find all their studies brought into focus and accord, respect for lawful authority and obedience to the law will be the natural concomitant of their growth, and each of them will be properly prepared to follow the faith of his or her father, as he or she receives the same at mother's knee or father's side and as such faith is expounded and strengthened for them by his or her religious leaders.

We believe that thus the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home, which is the mark of true character training and the sure guaranty of a country's welfare.

We believe that such is the best way of insuring that this government and our way of life shall not perish from the earth.

We believe that this statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.